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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MISSOURI EX. REL. PAUL BEHLE, *et. al.*

EXCEPTIONS OF DONALD E. ROTH,

Petitioner,

VS.

THE HONORABLE HARRY STUSSIE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTION PRESENTED

May the Supreme Court of Missouri legislatively change substantive statutory rights under its rule making authority?

The Petitioner's land has been ordered condemned by a Missouri trial court. This order condemning the land has been recorded in the office of the Recorder of Deeds. The Missouri condemnation statute, R.S. Mo. §523.040, provides that the condemning authority *shall pay* into the registry of the Court the amount assessed by 3 freeholders as their opinion of damages. In pertinent part R.S.Mo. §523.040 provides:

"...upon failure to pay the assessment aforesaid, the Court may, upon motion and notice by the party entitled to such damages, enforce the same by execution,..."

This interim amount of damages is a fund substituted as the res for the property and damages until such time as a final determination may be made by trial by jury. The right to trial by jury may be had by either party filing "Exceptions" to the interim award of damages. A Missouri case, *State ex rel. Holladay v. Withrow* 24 S.W. 638, 641 (Mo. 1891), holds that a property owner has an "absolute right" to require the payment of the interim award into the registry of the Court before anything else is done in the condemnation case except for the necessary filing for jury trial.

In 1972 the Supreme Court of Missouri adopted Rule 41.02. It says:

"RULE 41.02 RULES—AUTHORITY FOR STATUTES SUPERSEDED

Rules 41 to 101 inclusive are promulgated pursuant to authority granted this Court by Section 5 of Article V of the Constitution of Missouri and *supersede all statutes* and existing court rules inconsistent therewith." (Emphasis added)

Rule 86.06 adopted by the Supreme Court pursuant to 41.02 above goes beyond R.S.Mo §523.040 in several respects but in particular it

changes the mandatory "pay-in" language of §523.040 to a different point in time. It, Rule 86.06, provides:

"...upon failure to pay the assessment aforesaid, *within 10 days after it becomes final*, ...the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution,..."

In this case it has been held by the Missouri Court of Appeals that the underlined language above, added to the statutory language by Court Rule 86.06, delays the payment until after the jury trial that is preserved by either party's request for jury trial in the form of "Exceptions". See Opinion attached at p. A-2 of this brief. During this entire time-long or short- Petitioner's land "stands condemned" by the Missouri trial court and the Recorder of St. Louis County shows a lien on the Petitioner's property.

The legislative action of the Supreme Court of Missouri applied in conjunction with Rule 41.02 deprives Petitioner of a statutory right in violation of the separation of powers doctrine of the Constitution of the United States and further deprives Petitioner of his right to just compensation for lands condemned in violation of the 5th and 14th Amendments to the Constitution of the United States.

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**PETITION FOR A WRIT OF CERTIORARI
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THE STATE OF MISSOURI**

Donald E. Roth respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Missouri in this case.

1. OPINIONS BELOW

The order of the Missouri Supreme Court denying Petitioner's application to transfer (App. A, *infra.*, p. A-1) is unreported. The opinion of the Missouri Court of Appeals for the Eastern District of Missouri (App. A *infra* p. A-2) is reported at 793 S.W.2d 567 (Mo. App. 1990). A copy of the order of the St. Louis County Circuit Court Division 2, Stussie, J., denying Petitioner's motion to compel payment into court of the assessed damages is appended hereto (App. B, *infra* p. B-3). A copy of that same court's order of condemnation of Petitioner's property and order appointing commissioners is appended hereto. (App. B, *infra* B-4-7)

JURISDICTION

The order of the Supreme Court of Missouri denying Petitioner's application for transfer from the Missouri Court of Appeals was filed September 11, 1990. The judgment of the Missouri Court of Appeals was filed June 26, 1990.

Petitioner seeks this Court's review by certiorari pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following citations are set forth verbatim in Appendix D, pursuant to U. S. Supreme Court Rule 14.1(f).

U. S. CONST. Amend. V

U. S. CONST. Amend. XIV

MO. CONST. Art. II, §1 (1945)

MO. CONST. Art. I, §26 (1945)

MO. CONST. Art. V, §5 (1945)

Mo. Rev. Stat. §523.040 (1986)

Mo. Sup. Ct. Rule 86.06

Mo. Sup. Ct. Rule 41.02

STATEMENT OF THE CASE

1. ORIGIN OF FEDERAL QUESTION:

Petitioner first raised the Federal constitutional issues in his motion to compel the Missouri Highway Commission to pay the assessed damages into the Circuit Court of St. Louis County. (App. C, *infra*. p. C-1). There is no record of the proceedings on that motion other than the written motion and order denying it. (App. B, p. B-3). By denying the motion, the County Circuit Court obviously did not accept Petitioner's Federal question arguments.

Petitioner further raised the due process, 5th Amendment and 14th Amendment, issues in the Missouri Court of Appeals, in his Petition for Mandamus. (App. C, *infra*. p. C-4).

The Court of Appeals for the Eastern District of Missouri essentially ignored the constitutional issues raised by Petitioner. In its opinion (App. A, *infra* p. A-2) the Court declined to apply the procedure set forth in the applicable statute R.S.Mo. §523.040 and instead felt constrained by Missouri Supreme Court Rule 41.20 to apply the procedure set forth in Missouri Supreme Court Rule 86.06. It found R.S.Mo. §523.040 and 86.06 to be inconsistent. The Court of Appeals simply did not reach the constitutional issues involved.

In deciding that Rule 86.06 and R.S.Mo. §523.040 are inconsistent, the Court of Appeals invoked Missouri Supreme Court Rule 41.02, thus raising the federal and state constitutional issues of the doctrine of separation of powers. These issues were raised as well as the due process issues, in Petitioner's Application for Transfer to the Missouri Supreme Court. (App. C, *infra*, p. C-7).

Not unexpectedly, the Missouri Supreme Court did not find its own court rules violative of the taking clauses or of the doctrines of separation of powers and denied Petitioner's Application for Transfer.

2. FACT CHRONOLOGY AND PROCEEDINGS BELOW:

June 14, 1989: Order of Condemnation entered against Petitioner's property by the Honorable Harry Stussie, Judge of the St. Louis County Circuit Court in response to petition of the Missouri Highway and Transportation Commission. Pursuant to Missouri law, a commission of 3 freeholders was appointed by the court to assess damages.

September 8, 1989: Report of Commissioners filed with County Circuit Court assessing Petitioner's damages in the amount of \$1,470,454.00.

September 8, 1989: Report of Commissioners and order of condemnation recorded and indexed by Recorder of Deeds, St. Louis County, pursuant to R.S.Mo. §523.040. September 14 & 15, 1989: Petitioner and Missouri Highway and Transportation Commission filed exceptions in the Circuit Court to preserve their respective rights to a trial by jury.

September 22, 1989 - Present: Missouri Highway and Transportation Commission refused and continues to refuse to pay into court the amount assessed. The Commission has not abandoned the highway project or given notice of any intention to abandon.

October 31, 1989: Petitioner files Motion to Compel the payment of the amount of the Commissioner's award to the Circuit Clerk.

November 30, 1989: Petitioner's Motion denied by the Honorable Harry Stussie, Jr., St. Louis County Circuit Court.

December 19, 1989: Petitioner files Petition for Writ of Mandamus to Missouri Court of Appeals for Eastern District of Missouri.

January 3, 1990: Missouri Court of Appeals issues a preliminary Writ of Mandamus.

June 26, 1990: Opinion of Missouri Court of Appeals filed quashing its preliminary Writ of Mandamus, sanctioning the withholding by the Missouri Highway Commission of the assessed damages, based on Missouri Supreme Court Rules 41.02 and 86.06.

September 11, 1990: Order of Missouri Supreme Court filed denying Petitioner's Application for Transfer.

The proceedings prior to this Writ culminated with the June 26, 1990, decision of the Missouri Court of Appeals, as ratified by the

Missouri Supreme Court, on September 11, 1990. The decision follows the Missouri Supreme Court Rules instead of giving effect to Petitioner's constitutionally and statutorily derived substantive rights.

In denying Petitioner's statutory right to payment, the Missouri Court of Appeals ruled as follows:

"The Rules of Civil Procedure promulgated by our Supreme Court 'supersede all statutes...inconsistent therewith'. Rule 41.02. Rule 86.06 is inconsistent with the relevant language in §523.040 in a critical respect. As indicated that statute authorizes enforcement by execution of a commission of freeholders' assessment 'upon failure to pay the assessment...' Rule 86.06, on the other hand, permits execution 'upon failure to pay the assessment...*within 10 days after it becomes final...*' (court's emphasis). An assessment by a commission cannot become final if either the condemnor or condemnee files exceptions, which are neither withdrawn nor dismissed...Under Rule 86.06, which supersedes §523.040 to the extent the rule is inconsistent with the statute, Mr. Roth has no right to have the Commissioners' assessment paid into the trial court's registry." *State ex rel Behle, et al.* 793 S.W.2d at 568.

This ruling expressly denies Petitioner his statutory right to just compensation for his condemned property for the time of the pendency of the jury trial in violation of his rights to such compensation guaranteed by the 5th Amendment to the United States Constitution.

In addition, the application of Rule 86.06 as an amendment to §523.040 patently violates the separation of powers doctrine implicit in the United States Constitution.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The crux of this case is that the Missouri Supreme Court's Rules of Civil Procedure deny petitioner a substantive right specifically provided by statute. When these procedural Rules "supersede" a given substantive statutory right, they clearly effect an encroachment on the legislative power of the Missouri legislature.

In *State ex. rel. State Highway Commission v. Armacost Motors, Inc.*, 502 S.W.2d 300 (Mo. 1973) the Supreme Court of Missouri recognized the position postulated by Petitioner. It said at l.c. 332:

"Rule 81.06, ...cannot extend the right of appeal granted by the statute. Mo. Const. Art. V §5, V.A.M.S. There must be either a judgment or an order within the limits of §512.020."

Abuses occur when condemnors tie up property in litigation for years without having to pay the landowner a cent. Conversely, the condemnor would certainly not want to wait for the jury verdict before building its road. Equality is lacking. Equal protection is absent. Condemning property, especially for a public highway, renders it inalienable. It takes it off any potential real estate market which may have existed for it. Yet following Missouri Supreme Court Rule 86.06, a landowner must wait until a final judgment is rendered on any exceptions taken to the Commissioner's award, *if the condemnor so decides*.

a. CONDEMNATION WITHOUT COMPENSATION

Condemnation of private property is in derogation of the Common Law. Cases are so numerous as to not require citation that being in derogation of the Common Law the Constitutional and statutory grants of power are to be strictly construed against the condemnor.

The 5th Amendment of the Constitution of the United States and the Constitution of Missouri 1945 prohibit the condemnation of private property without just compensation. In the Federal setting the "condemnation" is by a "taking"; in Missouri it may occur by a "taking or damaging". MO. CONST. Art. 1, §26 (App. D, p. D-3).

Petitioner's statutory right under R.S.Mo. §523.040 to a commissioner's award is constitutionally derived. The right to just compensation for lands condemned is a basic tenet of state and federal constitutional guarantees. Constitution of Missouri Article 1, §26, Constitution of the U.S. 5th and 14th Amendment. Indeed the Constitution of Missouri upon which R.S.Mo. §523.040 is based guarantees that " [compensation] shall be paid...into court for the owner, the property shall not be disturbed or the proprietary rights therein divested" *Id.* (Emphasis Added). Consistent with this constitutional mandate, the Missouri Legislature included in §523.040 language which required payment of the assessed damages into the Court upon the recording of the commissioner's report. The statute also authorizes action upon the commissioner's award 10 days after the recordation of the report, unless the appropriation is abandoned.

This statutory language is not merely procedural. It creates a substantive right to compensation at a specific stage in the condemnation proceeding. The purpose of the commissioner's award is to establish a value of the land so that a substituted *res* can be put up by the condemnor to assure adequate compensation to the landowner. The Trial Court's Order of Condemnation and the recordation of the commissioners' report are not mere threats of condemnation nor are they akin to the mere passage by a governmental authority of a zoning ordinance which may affect the value or use of land. See *Agins v. City of Tiburon*, 447 U.S. 255 (1980). They are final steps in the condemnation process, albeit subject to appeal, *as to amount only*, which indefinitely alter the character and right to the property. *In the meantime* the status quo is that the title to Petitioner's property is clouded and the practical ability to dispose of his property is ripped out from under him for at least as long as it takes for both sides to prosecute the "Exceptions".

In a condemnation context, this Court has defined property rights as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corps*. 323 U.S. 373, 378, (1945). As one treatise has explained:

“The integral or entire right of property includes four particulars:

- (1) Right of occupation
- (2) Right of excluding others
- (3) Right of disposition, or the right of transferring the integral right to other persons.
- (4) Right of transmission in virtue of which the integral right is often transmitted after the death of the proprietor, without any disposition on his part, to phase in whose possession he would have wished to place it.”

2. J. Sackman and P. Rohan, *Nichols' Law of Eminent Domain* §5.01[1] (3rd Ed. 1990) quoting 3 *Bentham's Works* (1843 Ed.) 182. The latter two rights, (3) and (4), are precisely what is effected upon the filing and recordation of the Condemnation Order and commissioners' report.

The interference with Petitioner's rights in his property during the pendency of the “Exceptions” has been determined to be *the reason* R.S.Mo. §523.040 allows action on the commissioners' award 10 days after it is filed. In *State ex rel. Holladay v. Withrow*, 24 S.W.638 (Mo. 1891), the Missouri Supreme Court construed the identical predecessor to §523.040 stating: “...the owner has the absolute *right* to have the damages assessed by the commissioners brought into court *before* his land is taken, or *any other step in the proceeding to condemn it except the filing of exceptions to the report...*” *Id.* at 641. Indeed, the *Withrow* court at that time found the right to enforce the commissioner's award during the pendency of the appeal to the Circuit Court important enough to state that the right is absolute and the duty of the court imperative. In such cases the word “may” must be read as “shall”. *Id.* at 641.

The procedure envisioned in the Uniform Eminent Domain Code, §1001 is that the right to compensation for a defendant in condemnation proceeding “accrues upon the date of filing of the complaint” commencing the action.

In "quick take" statutory schemes, as under the present Federal Rules, due process concerns are addressed by the provisions in those statutes that compensation must be paid *prior* to disturbance of a landowner's property interest, with the correct amount of compensation left to the adjudicative process in the statute. The concern of challenges to these statutes is that there may not have been adequate provision for the absolute payment of compensation, especially where the statute fails to provide compensation in the event the condemnation was abandoned or dismissed. *Suncrest Lumber Co. v. North Carolina Park Commission* 30 F.2d 121, appeal dismissed, 280 U.S. 615, (1929).

The due process challenges to statutory "quick-take" schemes grew from this Court's decision in *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890). In *Cherokee Nation* the 1884 Congressional Act authorizing the building of a railroad through the Indian Territory provided a statutory compensation method almost identical to the present Missouri provision in §523.040. The act provided:

"...full compensation' shall be made to such occupants for all property to be taken, or damage done, by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant, such compensation shall be determined by the appraisement of three disinterested referees to be appointed by the President... Either party being dissatisfied with the finding of the referees shall have the right, within 90 days after the making of the award and notice of the same, to appeal by original petition to the Courts, where the case shall be tried de novo. *When proceedings have been commenced in court*, the railway company shall pay double the amount of the award into court to abide the judgment thereof, and then have the right to enter upon the ground sought to be condemned, and proceed with the construction of the railroad." (Emphasis Added.)

Mr. Justice Harlan found this arrangement to provide adequate protection to secure compensation to the owner.

In this case the statute, §523.040, provides for a substituted *res* to be paid into the court pending the final determination of the exceptions. It thus contains the reasonable, certain and adequate provision for obtaining compensation *before* proprietary rights are harmed, in accordance with *Cherokee Nation*, *supra*, and the decision in *Suncrest Lumber*, *supra*.

Mo. Sup. Ct. Rule 86.06, on the other hand, provides no security for a landowner whose land is condemned. Rule 86.06 provides no constitutionally mandated "adequate provision for compensation". Unlike the statute in *Cherokee Nation*, *supra*, Rule 86.06 provides no enforceable damage provision to landowners.

The situation where the condemnor can have property judicially condemned and valued by a board of commissioners, yet elect to pay no compensation as security for that award while waiting for the Circuit Court jury trial of the final amount, is analogous to fact situations in cases decided by this Court involving "temporary takings" and takings which were less than the *physical* possession of land.

In the recent case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 107 S.Ct. 2378 (1987), this court recognized that property rights could be taken without a physical occupation by the condemning authority. In *First English*, an ordinance prohibited condemnees from erecting any buildings on their previously flooded property. In assuming, without deciding, that the ordinance effectively denied condemnee all use of their property and thereby constituting a taking, the Court held that condemnee should be compensated, stating:

"We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."

Id. at 321.

Holding that temporary regulatory takings are compensable, this Court acknowledged that something less than a permanent or irreversible physical taking deserves constitutional protection. *Id.* at 318, 319. In *First English*, compensation was required even though the ordinance involved was later invalidated.

This Court's acknowledgement of the compensability of "temporary takings" is wholly consistent with the basic notion in this case that upon the order of condemnation entered and the commissioners' report being filed and recorded, compensation must be afforded.

Petitioner acknowledges that the mere initiation of condemnation proceedings, such as *filing a complaint* does not rise to the level of an appropriation of his property, see *Government of Virgin Island v. 50.05 Acres of Land*; 185 F.Supp. 495. However, the entry and filing of an order of condemnation and the entry and recording of the commissioner's report are not merely the "initiation of proceedings". Under §523.040, these acts are the culmination of the condemnation proceedings, subject only to appeal of the commissioner's valuation by a jury trial. To maintain that Petitioner has lost no rights to his property until the highway department takes possession is to ignore reality.

b. RULE 41.02 AND 86.06 UNCONSTITUTIONALLY ENCROACH ON THE LEGISLATIVE POWER OF THE MISSOURI LEGISLATURE

The conflict in the condemnation provision in Rule 86.06 with R.S.Mo. §523.040 is not only apparent on its face, but the Missouri Court of Appeals in this case expressly found them to be inconsistent with each other. *State ex. rel. Behle, et al. Exceptions of Donald Roth v. Stussie*, 793 S.W.2d 567 (Mo. App. 1990) at 568, 569. The difference between the statute and Rule 86.06 is a substantive, material inconsistency. Following the statute, a condemnee has a *res*, a security for lands condemned and a right to have that money made immediately available to him. Following the Rule 86.06, he has only a hope of being compensated, and then only at a point in time that is dependent upon the reason or whim of the condemning authority. This separation of

powers issue is clearly drawn by the Missouri Court of Appeals in the present case.

The separation of powers doctrine was summarized by this Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)

“To ensure against...tyranny, the Framers provided that the Federal Government would consist of three distinct branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct. The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”

Id. at 58, 59 quoting *Buckley v. Valeo* 424 U.S. 1, 96 S.Ct. 612, 683.

The long-standing application of this doctrine to the judiciary is the general prohibition against judicial legislation. This Court through the years has been vigilant in resisting opportunities to rewrite or supply perceived deficiencies in legislation. In *Ebert, et al. v. Roston* 266 U.S. 548, 45 S.Ct. 188 (1925) the Court reversed a state court construction of a federal statute, stating “(a) *casus omissus* does not justify judicial legislation”. See also *Iselin v. U.S.*, 270 U.S. 245, 46 S.Ct. 248 (1926); *Matson Navigation Co. v. U.S.* 284 U.S. 352, 52 S.Ct. 162 (1932). Even in situations where the legislation seemed to the Court to have inadvertently omitted language so as to unfairly discriminate when applied, the Court would not rewrite the statute. *Electric Storage Battery Co. v. Shimadzu* 307 U.S. 5, (1939). Where “a great degree of uncertainty exists” with respect to a statutory provision, as in *United States v. Evans*, 333 U.S. 483, 68 S. Ct. 634 (1948), the Court held it “outside the bounds of judicial interpretation” to provide clarity. *Id.* at 1695.

Against the backdrop of this Court’s history of not allowing judicial legislation is the legislative delegation of the power to promulgate rules of civil procedure. In Missouri, this rule making power is specifically set forth in the Missouri Constitution Article V Section 5:

"The Supreme Court may establish rules of practice and procedure for all courts. *The rules shall not change substantive rights....*"

This Court upheld the validity of Congress' delegation in *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S. Ct. 422 (1941).

In *Sibbach v. Wilson & Co.*, *supra*, the Court stated:

"Congress has undoubted power to regulate the practice and procedure of Federal courts, and may exercise that power by delegating to them or other Federal courts authority to *make rules not inconsistent* with the statutes or Constitution of the United States." (Emphasis Added), *Id.* at 9, 10.

This Court has operated under this principle since *Wayman v. Southard* 23 U.S. (10 Wheat) 1, 6 L.Ed. 253 (1825) where the Court examined the whole question of the power of Courts to regulate "the forms and modes of writs." *Id.* at 13.

The admonition to not make procedural rules inconsistent with statutes has been respected by this Court through the years as a corollary to the separation of powers doctrine. In *Ex Parte Woolen* 104 U.S. 300 (1881), this Court examined the Justices' rule making authority in bankruptcy cases, and found they could not alter or amend the law, but they could prescribe rules and regulations to aid in carrying it into effect." *Id.* at 301.

In *United States v. National City*, 334 U.S. 573, (1948), this Court expressly found that a federal rule of civil procedure does not override conflicting venue provisions of the Clayton Act.

On the federal level, this Court has enforced the notion that procedural rules should not conflict with substantive rights given by statute. While the power to make rules respecting procedure in the courts is unquestioned, this Court long ago recognized in the context of eminent domain proceedings that "the *mode of exercising the right of eminent domain*, in the absence of any provision in the organic law prescribing a contrary course, *is within the discretion of the legislature.*" (Emphasis Added.) *Secombe v. Railway Co.* 90 U.S.(23 Wall) 108 (1874), See also, *United States v. Welch*, 327 U.S. 546 (1946).

The Missouri Supreme Court Rules promulgated in 86.06 fly in the face of this Court's decisions respecting the scope and authority of judicial rule making. The rule encroaches on the plain language of the statute in violation of applicable federal guarantees against the "aggrandizement of one branch of government on another." *Northern Pipeline*, supra.

The Missouri Supreme Court in *State of Missouri ex rel. Clifford Morrison v. Pallison* 369 S.W.2d 563 (Mo.banc 1963) flatly states that Rule 86.06 "was promulgated in an effort to supply deficiencies and generally to clarify condemnation procedures..." Id. at 564. This may be a noble cause, but the Court in the context of this case has overstepped its rule-making authority.

CONCLUSION

Wait until the case is tried, appealed and may be re-tried and then pay the final judgment and then build the road or highway. Next we will be just building the road and trying the case as an inverse condemnation case.

There was a *judicial taking* on June 14, 1989, when Judge Stussie ordered the land condemned for public use. The County land records show that fact. With the judicial taking the Constitution requires payment. The Missouri Statute provides for such payment.

The abuses inherent in following Rule 86.06 are apparent. Therefore, the portions of Rule 86.06 which are in conflict with R.S.Mo §523.040, as that statute applies to the required payment of money into Court for the benefit of the condemnee, are unconstitutional. The adoption of 86.06 by the Supreme Court of Missouri violates both State and Federal precepts of the separation of powers. Rule 86.06 also does not provide Constitutional protection of property in that it permits condemnation without just compensation.

The basic tenet of freedom is the right to own property- free of governmental interference-that is what makes our Country so unique in the World. It is the freedom to sell one's property, to use one's property that is such an inalienable right. The freedom from unjust conscription of

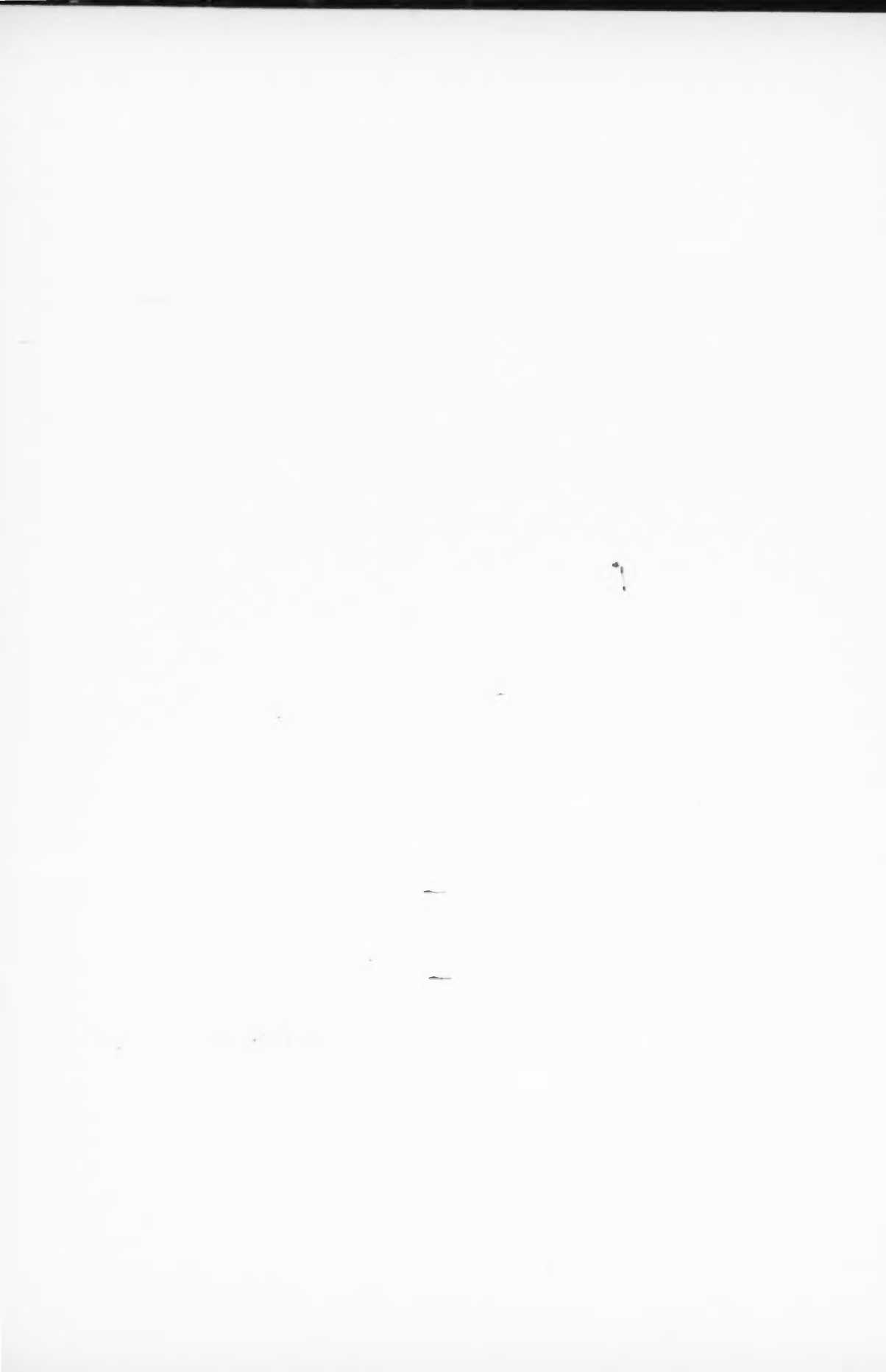
property or person was the founding trunk of our Constitution and attracted "the tired, the poor and the hungry" to our shores.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSOURI

No. 73018

E.D. No. 57713

September Session, 1990

State of Missouri, ex rel.,

Paul L. Behle, et al.,

Exceptions of Donald E. Roth,

Relator,

vs. (TRANSFER)

Honorable Harry Stussie,

Respondent.

Now at this day, on consideration of relator's application to transfer the above-entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of the Supreme Court, entered on record at the September Session thereof, 1990, and on the 11th day of September, 1990, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 11th day of September, 1990.

Clerk

D.C.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

WRIT DIVISION THREE

No. 57713

STATE OF MISSOURI, EX REL.
PAUL L. BEHLE, ET AL.,
EXCEPTIONS OF DONALD E. ROTH,
Relator,

vs.

HONORABLE HARRY STUSSIE,
Respondent.

WRIT OF MANDAMUS

Opinion Filed: June 26, 1990

In this case, we have issued our preliminary writ in mandamus. Petitioner Mr. Donald E. Roth (Mr. Roth), defendant in the underlying action, is a landowner whose property is being condemned by the Missouri Highway & Transportation Commission (Highway Commission), plaintiff in the underlying action. Mr. Roth rejected the Highway Commission's offer of \$70,880.00 as compensation for the property to be taken. As required by §523.040¹ and Rule 86.06, the trial court appointed a commission of three disinterested freeholders (commissioners) to assess the damages caused by the proposed condemnation. The commissioners recommended an assessment of \$1,470,454.00. Both Mr. Roth and the Highway Commission filed exceptions to this assessment. A trial on the exceptions is currently pending, in accordance with §523.050.1 and Rule 86.08.

On Mr. Roth's petition, we entered our preliminary order in mandamus directing the respondent judge to compel the Highway Commission to pay into the trial court's registry, prior to trial on the

¹All statutory references are to RSMo 1986, unless otherwise indicated.

exceptions, the assessment made by the commissioners. We now quash that writ.

Mr. Roth contends that §523.040 requires the trial court to grant his motion to compel the Highway Commission to pay the assessments made by the commissioners into court before trial on the exceptions to the commissioners' assessment. Section 523.040 provides in pertinent part:

... upon failure to pay the [commission of freehold- ers'] assessments, ... the court *may*, upon motion and notice by the party entitled to ... damages, enforce the payment of the same by execution, unless the [con- demnor] shall, within 10 days from the return of such assessment, elect to abandon the proposed appropriation of any parcel of land, by an instrument in writing to that effect ... (emphasis added)

In *State ex rel. Holladay v. Withrow*, 24 S.W. 638, 641 (Mo. 1891), a Division of our Supreme Court construed identical language in a predecessor statute, Chap. 66, §3, Gen. St. 1865, to *require*, rather than simply permit, a trial court to grant a condemnee's motion to enforce payment of the commissioners' assessment into the court's registry pending trial on the exceptions. The divisional decision in *Withrow* is not controlling. The Division which decided that case transferred it to the Court En Banc, where the case was dismissed. 24 S.W. at 638, n. 1. However, even if the Division's interpretation of the language now found in §523.040 were more authoritative, Mr. Roth's reliance on that statute is still misplaced.

The Rules of Civil Procedure promulgated by our Supreme Court "supersede all statutes ... inconsistent therewith." Rule 41.02. Rule 86.06 is inconsistent with the relevant language in §523.040 in a critical respect. As indicated, that statute authorizes enforcement by execution of a commission of freeholders' assessment "upon failure to pay the assessment" Rule 86.06, on the other hand, permits execution "upon failure to pay the assessment ... *within 10 days after it becomes final* ..." (emphasis added) An assessment by a commission cannot become final if either the condemnor or condemnee files

exceptions, which are neither withdrawn nor dismissed. *North Kansas City School District of Clay County v. J.A. Peterson-Renner, Inc.* 369 S.W.2d 159, 161 (Mo. 1963); *Washington University Medical Center Redevelopment Corp. v. See*, 654 S.W.2d 192, 194 (Mo. App. 1983).

Since both Mr. Roth and the Highway Commission filed exceptions to the commissioners' assessment in this case, that assessment is not final. Under Rule 86.06, which supersedes §523.040 to the extent the rule is inconsistent with the statute, Mr. Roth has no right to have the commissions' assessment paid into the trial court's registry.

Our preliminary writ in mandamus directing the respondent judge to compel the Highway Commission to make such a payment was improvidently granted and is hereby quashed.

HAROLD L. SATZ, PRESIDING JUDGE

Smith, J., and Stephan, J. concur.

APPENDIX B

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

NO. 57713

**Writ of Mandamus from the
Circuit Court of St. Louis County**

Cause No. 594074

Division No. 2

**STATE OF MISSOURI, EX REL,
PAUL L. BEHLE, et al.,
Exceptions of Donald E. Roth,
Relator,**

vs.

**HONORABLE HARRY STUSSIE,
Respondent.**

PRELIMINARY ORDER IN MANDAMUS

The State of Missouri to Respondent, Honorable Harry Stussie,
Judge of the Circuit Court of St. Louis County.

You are hereby directed to file your answer to the petition in
mandamus on or before January 11, 1990 and to serve a copy of your
answer upon Samuel C. Ebling, attorney for Relator, whose address is
11 South Meramec, Suite 1400, St. Louis, Missouri 63105. If you fail
to do so, judgment by default will be taken against you for the relief
demanded in the petition.

Relator's brief due January 29, 1990

Respondent's brief due February 20, 1990

Relator's Reply brief, if any, due February 28, 1990

Cause set for oral argument on Monday, March 5, 1990 at 2:30 p.m.
at the Missouri Court of appeals, Wainwright State Office Building,
111 N. Seventh Street, St. Louis, Missouri 63101.

DATED: January 3, 1990

Hon. Harold L. Satz
Presiding Judge
Writ Division III
Missouri Court of Appeals
Eastern District

CC: Samuel C. Ebling
Kenneth E. Dick
David A. McMahon
Lynn Whaley

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21st JUDICIAL CIRCUIT

Cause No. 594074

Division No. 2

STATE OF MISSOURI, EX REL.,
STATE HIGHWAY TRANSPORTATION COMMISSION,
Plaintiff,

vs.

PAUL L. BEHLE, et al.,
Exceptions of Donald E. Roth,
Defendants.

Appearing before the Court this day were counsel for Plaintiff and Defendant. Motion to pay commissioners award to Circuit Clerk was heard and denied.

LYNN ANN WHALEY #35107
329 S. Kirkwood, St. Louis, MO 63122

SAMUEL C. EBLING
11 So. Meramec, Suite 1400
St. Louis, Missouri 63105

SO ORDERED:

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21st JUDICIAL CIRCUIT

Cause No. 594074

Division No. 2

STATE OF MISSOURI, EX REL.,
STATE HIGHWAY TRANSPORTATION COMMISSION,
Plaintiff,

vs.

PAUL L. BEHLE, et al.,
Exceptions of Donald E. Roth,
Defendants.

ORDER OF CONDEMNATION

On the 2nd day of June, 1989, the Plaintiff, Missouri Highway and Transportation Commission, appeared by Zachary T. Cartwright, and filed its Second Amended Petition in condemnation and presented evidence in support of the same. Now, on this 15th day of June, 1989, Plaintiff presents further evidence, and the court having seen and considered said Petition, and being fully advised in the matter, finds that due notice of the pendency of said Petition and of the time and place of hearing on it has been given; finds that said land, property and rights are being condemned for public state highway use; finds that Plaintiff is authorized by law to condemn and appropriate the lands, property and rights for said use and for the purposes as set out in the Petition; finds that Plaintiff has endeavored to agree with the Defendants and each of them, upon the proper compensation, if any, to be paid said several Defendants, respectively, for the land, property or rights sought to be appropriated, but that it cannot so agree; and finds that Plaintiff has complied with all requirements of law.

IT IS ORDERED, ADJUDGED AND DECREED that the lands, property and rights be and stand condemned for the uses and purposes as set out in the Petition and that Plaintiff shall have the rights to take possession or make use thereof immediately upon the filing of the

Report of Commissioners and the payment to the Circuit Clerk of the respective amount, if any, which may be assessed in said report.

Circuit Judge
St. Louis County

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21st JUDICIAL CIRCUIT

Cause No. 594074

Division No. 2

STATE OF MISSOURI, EX REL.,
STATE HIGHWAY TRANSPORTATION COMMISSION,
Plaintiff,
vs.

PAUL L. BEHLE, et al.,
Exceptions of Donald E. Roth,
Defendants.

ORDER APPOINTING COMMISSIONERS

An Order of Condemnation in the above-styled cause was entered by this Court on the 15th day of June, 1989. Pursuant to Section 523.040 RSMo. 1986 and Missouri Supreme Court Rule 86.06, it is further ordered that:

Ms. Jill Wehmer, 120 S. Central, Clayton, MO 63105

Mr. Robert Pascal, 225 S. Meramec, Clayton, MO 63105 and

Mr. Robert Bennett, 6351 Harmaan Estates, Bridgeton, MO 63044, three disinterested freeholders and residents of the county in which the real estate, property and rights ordered condemned are situated, be and are hereby appointed commissioners to assess the damages, if any, which the owners of the subject tract, property or right, respectively may sustain by reason of appropriation by the Missouri Highway and Transportation Commission; and that they shall take into consideration the benefits to be derived by the owners as well as the damages sustained hereby.

IT IS FURTHER ORDERED that said Commissioners shall forthwith meet, qualify according to law, view the property and forthwith return, under oath, to the Circuit Clerk their report in triplicate, setting forth as to each Defendant (1) the amount of net damages,

if any, together with (2) a specific description of the property, for the taking or use of which the damages are assessed; and the Clerk shall (a) file one of said copies in his office and record the same in the order book of the court; (b) forward a copy to the attorney of record for the Commission and (c) deliver the final copy, duly certified, to the Recorder of Deeds of the County, who shall record the same in the Recorder's Office, properly indexing said tract.

IT IS FURTHER ORDERED that the said Clerk forthwith thereafter duly notify the defendants of the filing of said report.

St. Louis County Circuit Judge

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APPENDIX C

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21st JUDICIAL CIRCUIT**

Cause No. 594074

Division No. 2

**STATE OF MISSOURI, EX REL.,
STATE HIGHWAY TRANSPORTATION COMMISSION,
Plaintiff,**

vs.

**PAUL L. BEHLE, et al.,
Exceptions of Donald E. Roth,
Defendants.**

**MOTION TO PAY COMMISSIONERS AWARD
TO CIRCUIT CLERK**

COMES NOW the Defendant, DONALD E. ROTH, and states as follows:

1. On or about the 15th day of June, 1989, this Court ordered the condemnation of Defendant Roth's land and property rights and did duly appoint three disinterested free holders resident of the County of St. Louis as commissioners in the above-captioned cause to assess the amount of just compensation Defendant Roth was entitled to receive.

2. On or about the 12th day of September, 1989, the three commissioners so appointed did file their report of the assessment of damages to the above Defendant in the amount of One Million Four Hundred Seventy Thousand Four Hundred Fifty-four and No/100 Dollars (\$1,470,454.00).

3. Thereafter, the Circuit Clerk of the County of St. Louis did deliver a certified copy of the commissioner's report to the Recorder of Deeds of the County of St. Louis.

4. Thereafter, the Recorder of Deeds of the County of St. Louis recorded and indexed said report in the Grantor and Grantee indexes of the County of St. Louis as provided in Section 59.440 RSMo.

5. On October 3, 1989, the District Counsel of the Missouri Highway and Transportation Commission, acting on the direct authority of the Chief Counsel of the Commission, advised Defendant Roth's counsel that the Commission was not going to pay the assessment reported by this Court's Commissioners to the Defendant or to the Circuit Clerk of the County of St. Louis for Defendant's use.

6. Section 523.040 RSMo provides that the Commission "*shall pay*" the assessed amount to the clerk and in the event it does not, this Defendant, upon Motion and Notice, can require such payment to be made.

7. The failure to pay such money into court for the use of the property owner as the substituted *res* in lieu of his property is in violation of the due process provisions of Article I Section 10 of the Constitution of Missouri, 1945, and the due process provisions of the 5th and 14th Amendments to the Constitution of the United States; in addition, said failure to pay is in violation of the prohibitions against the taking or damaging of property without just compensation as provided in Article I Section 26 of the Constitution of Missouri, 1945, and the prohibition against taking property without just compensation contained in the 5th Amendment to the Constitution of the United States.

WHEREFORE, Defendant, DONALD E. ROTH, prays this Court enter its Order directing the Plaintiff to pay the amount of the Commissioner's assessment to the Circuit Court of the County of St. Louis, or in the alternative, to file its election to abandon the appropriation of Defendant's land and rights in land and dismiss this action at Plaintiff's cost.

A. David McMahon #16166
4422 Woodson Road
St. Louis, Missouri 63132

— C-3 —

GALLOP, JOHNSON & NEUMAN

SAMUEL C. EBLING #17461
1600 Interco Corporate Tower
101 South Hanley Road
St. Louis, Missouri 63105
(314) 862-1200

Attorneys for Defendant,
DONALD E. ROTH

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21st JUDICIAL CIRCUIT

Cause No. 594074

Division No. 2

STATE OF MISSOURI, EX REL.,
STATE HIGHWAY TRANSPORTATION COMMISSION,
Plaintiff,

vs.

PAUL L. BEHLE, et al.,
Exceptions of Donald E. Roth,
Defendants.

PETITION FOR WRIT OF MANDAMUS

To the Missouri Court of Appeals, Eastern District.

The petition of Donald E. Roth, relator in this proceeding respectfully represents:

1. On or about the 15th day of June, 1989, the Honorable Harry Stussie, Respondent, Judge of the Circuit Court of St. Louis County, ordered the condemnation of Relator Roth's land and property rights and duly appointed three disinterested freeholders, residents of the County of St. Louis, as commissioners in said cause to assess the amount of just compensation Relator Roth was entitled to receive. A copy of said order is attached hereto as Exhibit "A" and incorporated herein by reference.

2. On or about the 12th day of September, 1989, the three commissioners so appointed filed their report of the assessment of damages to the above Relator in the amount of One Million Four Hundred Seventy Thousand Four Hundred Fifty-four and No/100 Dollars (\$1,470,454.00). A copy of said report is attached hereto as Exhibit "B" and incorporated herein by reference.

3. Thereafter, the Circuit Clerk of the County of St. Louis delivered a certified copy of the commissioner's report to the Recorder of Deeds of the County of St. Louis.

4. Thereafter, the Recorder of Deeds of the County of St. Louis recorded and indexed said report in the Grantor and Grantee indexes of the County of St. Louis as provided in Section 59.440 R.S.Mo.

5. On or about the 3rd day of October, 1989, the District Counsel of the Missouri Highway and Transportation Commission, acting on the direct authority of the Chief Counsel of the Commission, advised Relator Roth's counsel that the Commission was not going to pay the assessment reported by the Court's Commissioners to the Relator or to the Circuit Clerk of the County of St. Louis for Relator's use.

6. Section 423.040 R.S.Mo. provides that the Commission "*shall pay*" the assessed amount to the Clerk and in the event it does not, the Relator, upon Motion and Notice, can require such payment to be made.

7. On or about the 30th day of November, 1989, the Honorable Harry Stussie, Respondent herein, heard and denied Relator's Motion to Pay Commissioners Award to Circuit Clerk. A copy of said motion and a copy of Respondent's order are attached hereto as Exhibit "C" and Exhibit "D" respectively, and incorporated herein by reference.

8. The failure to pay such money into Court for the use of the property owner as the substituted *res* in lieu of his property is in violation of the due process provisions of Article I, Section 10 of the Constitution of Missouri, 1945, and the due process provisions of the 5th and 14th Amendments to the Constitution of the United States; in addition, said failure to pay is in violation of the prohibitions against the taking or damaging of property without just compensation as provided in Article I Section 26 of the Constitution of Missouri, 1945; and the prohibition against taking property without just compensation contained in the 5th Amendment to the Constitution of the United States.

WHEREFORE, Relator, Donald E. Roth, prays that a preliminary order in mandamus issue out of this court commanding Respondent to file an answer directed to this petition.

Dated _____

Respectfully submitted,

GALLOP, JOHNSON & NEUMAN

By: _____

Samuel C. Ebling #17461

Kenneth E. Dick #36277

Interco Corporate Tower

101 S. Hanley Road, Suite 1600

St. Louis, Missouri 63105

McMAHON LEGAL SERVICES

By: _____

David A. McMahon #16166

4422 Woodson Road

St. Louis, Missouri 63132

Attorneys for Relator

IN THE SUPREME COURT OF MISSOURI
STATE OF MISSOURI

Cause No. _____

Missouri Court of Appeals
Eastern District, No. 57713

STATE OF MISSOURI, EX REL.,

Paul L. Behle, et al.,
Exceptions of Donald E. Roth,
Relator,

vs.

Honorable Harry Stussie,
Respondent.

APPLICATION FOR TRANSFER TO
THE SUPREME COURT OF MISSOURI

COMES NOW Relator, by and through counsel pursuant to Rule 83.03, and requests this Court to transfer this case to the Missouri Supreme Court for the following reasons:

1. The Court of Appeals found the provisions of Rule 86 inconsistent with the statutory provisions of §523.040 R.S.Mo. and further found that the Rules of Civil Procedure promulgated by our Supreme Court "supersede all statutes . . . inconsistent there- with." The Court of Appeals followed the Rule and not the controlling case law granting a substantive right under §523.040 R.S.Mo.

The Court's Rule 86, insofar as it is inconsistent with §523.040 is unconstitutional as being in violation of Article II and Article V, Section 5 of the Constitution of Missouri of 1945 and the "separation of powers" doctrine of the Constitution of the United States. The statutory language of §523.040 granted an absolute right, a substantive right, to have the money paid into court.

2. The Court of Appeals overlooked the fact that the Court below had entered an *Order of Condemnation*, which order states: "the court"

finds that said land, property and rights are being condemned for public state highway use; finds that Plaintiff is authorized by law to condemn and appropriate the lands, property and rights for said use and for the purposes as set out in the Petition;" "IT IS ORDERED, ADJUDGED AND DECREED THAT THE lands, property and rights be and stand condemned for the uses and purposes as set out in the Petition . . ." The appropriation as ordered then appears of record in the chain of title to this property. Property cannot be condemned for public use without the payment into Court of just compensation. Article I, Section 10 and Section 26, and Article V (due process and just compensation clauses) of the United States Constitution and Article I, Section 26 of the Constitution of Missouri, 1945.

WHEREFORE, Relator respectfully requests the Court to transfer this case to the Missouri Supreme Court.

Respectfully submitted,

GALLOP, JOHNSON & NEUMAN

By: _____

Samuel C. Ebling #17461
Kenneth E. Dick #36277
101 S. Hanley Road, Suite 1600
St. Louis, Missouri 63105
(314) 862-1200

McMAHON LEGAL SERVICES

By: _____

David A. McMahon #16166
4422 Woodson Road
St. Louis, Missouri 63132

Attorneys for Relator

APPENDIX D

CONSTITUTION OF THE UNITED STATES

**Amendment V Grand Jury Indictment for Capital Crimes;
Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES

Amendment XIV Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF MISSOURI

§26. Compensation for property taken by eminent domain - condemnation juries - payment - railroad property

Section 26. That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be

ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.

MO. CONST. Art. 1, §26

Article II

THE DISTRIBUTION OF POWERS

§1. Three departments of government - separation of powers

Section 1. The powers of government shall be divided into three distinct departments - the legislative, executive and judicial - each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly, belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances of this constitution expressly directed or permitted.

MO. CONST. Art. 11, §1

§ 5. Rules of practice and procedure - duty of supreme court - power of legislature

Section 5. The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose.

MO. CONST. Art. 5, §5

§523.040.

Appointment of commissioners - their duties

The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be free-holders, resident of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation, who, after having viewed the property, shall forthwith return to the clerk of such court, under oath, their report in duplicate, of such assessment of damages, setting forth the amount of damages allowed to the person or persons named as owning or claiming the tract of land condemned, and should more than one tract be condemned in the petition, then the damages allowed to the owner, owners, claimant or claimants of each tract, respectively, shall be stated separately, together with a specific description of the tracts for which such damages are assessed; and the clerk shall file one copy of said report in his office and record the same in the order book of the court, and he shall deliver the other copy, duly certified by him, to the recorder of deeds of the county where the land lies (or to the recorder of deeds of the city of St. Louis, if the land lies in said city) who shall record the same in his office, and index each tract separately as provided in section 59.440, RSMo 1949, and the fee for so recording shall be taxed by the clerk as costs in the proceedings; and thereupon such company shall pay to the said clerk the amount thus assessed for the party in whose favor such damages have been assessed; and on making such payment it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid; and upon failure to pay the assessment, aforesaid, the court may, upon motion and notice by the part entitled to such damages, enforce the payment of the same by execution, unless the same company shall, within ten days from the return of such assessment, elect to abandon the proposed appropriation of any parcel of land, by an instrument in writing to that effect, to be filed with the clerk of said court, and entered on the minutes of the court, and as to so much as is thus abandoned, the assessment of damages shall be void. (1506, A.L. 1945 p. 645)

Former Revisions: 1929, §1342; 1919, §1793; 1909, §2362; 1899, §1266; 1889, §2736.

REVISED STATUTES OF MISSOURI, §523.040 (1986)

**RULE 86.06 APPOINTMENT OF COMMISSIONERS -
DUTIES OF - STANDARD OF DAMAGES**

The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation. The value of the property being condemned and all benefits and damages shall be assessed by said commissioners as of the date the assessment is made, and, if the award of said commissioners has not been paid to the defendants, or the clerk of the court for said defendants, within one year after said commissioners' award is filed, any subsequent assessment of values, benefits and damages shall be as of the date of such subsequent assessment. Said commissioners, after having viewed the property, shall forthwith return, under oath, to the clerk of such court their report in duplicate setting forth, and stating separately as to all property held under the same ownership, (1) the amount of net damages, if any, together with (2) a separate description of the property for which the damages are assessed, and the clerk shall file on or said copies in his office and cause the other to be delivered to the recorder for the county where the property lies, who shall record the same in his office and shall enter in the abstract and index of deeds at the proper place in the grantor's column the respective names of the first persons alleged to claim, or through whom is claimed some title to each of such respective separately described properties, and the fee for said recording shall be taxed by the clerk as costs of the proceedings. When condemnation proceedings are brought in connection with a project to supply water to any city, town or village, the commissioners or jury shall inquire, and make report as to the value of the use of the stream, or the diversion of the waters thereof, to the extent to which the plaintiff proposes to use it,

or to divert them, or what damage will be done by the erection and maintenance of any dam or buildings which it is proposed to erect and maintain in connection with aforesaid supplying of water, specifically stating to who and upon what account damages are awarded. When private property is appropriated by a municipality for any public place or use, resulting benefits shall be assessed against the municipality for the amount of the benefit to the public generally and the balance of the benefits shall be assessed against the owner or owners having land within the benefit limits set by the municipality, which land shall be especially benefitted by the proposed improvement, to the proportion that each lot of said owners shall be benefitted. Upon making payment to the clerk of the amount assessed, for the party or parties in whose favor such damages have been assessed, it shall be lawful for the condemnor to take possession and hold the interest in the property so appropriated for the uses aforesaid; and, upon failure to pay the assessment aforesaid within ten days after it becomes final, or, in the case of a municipality, within thirty days thereafter, the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, unless the condemnor shall, within said ten or thirty day period, elect to abandon the proposed appropriation of any property, by an instrument in writing to that effect, to be filed with the clerk of such court, and entered on the minutes of the court, and to so much as is thus abandoned the assessment of damages shall be void. If such appropriation be so abandoned as to any property, proceedings for the condemnation of the same property shall not be instituted again within two years after such abandonment. The report of the commissioners, when signed by two of said commissioners, shall be taken and considered as the report of all.

(Amended March 13, 1961, effective Nov. 1, 1961).

MO SUP. CT. RULE 86.06

**RULE 41.02 RULES - AUTHORITY FOR - STATUTES
SUPERSEDED**

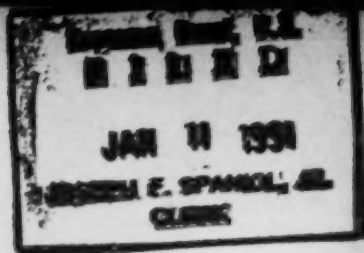
Rules 41 to 101, inclusive, are promulgated pursuant to authority granted this Court by Section 5 of Article V of the Constitution of Missouri and supersede all statutes and existing court rules inconsistent therewith.

(Adopted Feb. 1, 1972, effective Sept. 1, 1972).

MO. SUP. CT. RULE 41.02



(2)



No. 90-950

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MISSOURI EX REL. PAUL BEHLE, et al.
EXCEPTIONS OF DONALD E. ROTH

Petitioner,

VS.

THE HONORABLE HARRY STUSSIE

Respondent.

**BRIEF IN OPPOSITION TO
WRIT OF CERTIORARI**

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QUESTION PRESENTED

"May the Supreme Court of Missouri legislatively change substantive statutory rights under its rule making authority?"

This is the question posed by Petitioner which is effectively asking the Federal Court to interpret the relationship of a state court and the state legislature based on that state's constitution. Respondent would suggest that such an issue is beyond the scope of this Court and that the appropriate arena for interpretation of a state's constitution is only by that state's judiciary.

The issue as it should be presented is:

Has the Supreme Court of Missouri legislatively changed substantive statutory rights under its rule making authority?

The Missouri Supreme Court Rule 86.06 provides in pertinent part:

... upon failure to pay the assessment aforesaid, within ten (10) days after it becomes final, ... the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by *execution*, ... [emphasis added].

The Missouri Revised Statute Section 523.040 provides in part:

... and upon failure to pay the assessment, aforesaid, the court may, upon motion and notice by the part entitled to such damages, enforce the payment of the same by execution.

The Missouri Supreme Court has taken the position based on the rule that it is not within its judicial authority to interfere and enforce payment through execution on the condemning authority until the assessment is final. In reality, if the courts acted within the manner suggested by Petitioner, such actions would constitute a breach in the separation of powers doctrine. Petitioner suggests that courts should enforce payment of the commissioner's award before the trial on the exceptions even if there has been no taking. Such an action by the courts would be equal to committing a legislative function as payment of the award by the condemning authority would effect a taking and the

courts would be making a legislative decision. It is clear that the Supreme Court of Missouri was well aware of its limitations and the scope of its judicial authority when Rule 86.06 was drafted.

Petitioner has presented no factual basis before any court upon which they could find a taking, de jure or de facto, has occurred which violates his rights under either the 5th or 14th Amendments to the Constitution of the United States. There are several issues which remain and are yet to be litigated in the state courts. The allegations as they have been presented to this Court in the Petition are not ripe for review and Petitioner should be directed to exhaust the state remedies available.

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No. 90-950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MISSOURI EX REL. PAUL BEHLE, et al.
EXCEPTIONS OF DONALD E. ROTH

Petitioner,

vs.

THE HONORABLE HARRY STUSSIE

Respondent.

**BRIEF IN OPPOSITION TO
WRIT OF CERTIORARI**

On behalf of the Honorable Harry Stussie, Respondent, the Missouri Highway and Transportation Commission respectfully responds with its Brief in Opposition to Petitioner's Writ of Certiorari.

STATEMENT OF THE CASE

Respondent agrees with the facts of the case and the chronology of the case as set forth in the Petition for Writ of Certiorari. However, exception is taken to any legal conclusions presented therein.

The basic steps in condemnation proceedings under Missouri law as provided in Section 523.040 RSMo. 1986 and Missouri Supreme Court Rule 86.06 [Pet. App. D] are as follows:

1. Condemning authority files a petition;
2. Court enters an order condemning the land;
3. Court appoints three disinterested freeholders to assess the damages;
4. Commissioners' awards are recorded with Recorder of Deeds;
5. Either or both parties request a trial by filing exceptions;
6. Condemning authority may or may not pay the award into the Court at its election;
7. Prior to jury trial, condemning authority may not take possession until Commissioners' Award is paid into Court;
8. Ultimate jury trial on amount of damages and all appeals therefrom exhausted;
9. Amount of final judgment on verdict paid.

Respondent would direct the Court's attention to the facts wherein any and all action by the condemning authority has only been in the condemnation suit up to the point of filing exceptions. The Missouri Highway and Transportation Commission has not restricted the Petitioner's use of his property, nor is the Petitioner restrained in any manner from selling his property, therefore, no taking has been effected.

Additionally, Petitioner colors Rule 86.06 as an "amendment" to Section 523.040 RSMo. [Petition p. 5]. The Court of Appeals did not apply the rule to the statute. What they did was to find that the rule supersedes the statute and sets forth the correct procedures for the court's actions [Pet. App. A].

REASONS FOR DENYING THE PETITION

Before proceeding to the points raised by Petitioner, Respondent requests the Petition for Writ of Certiorari be denied as the case as it stands in the state courts has not achieved finality in any of the aspects required by the United States Supreme Court in order to review state condemnation proceedings.

In *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), this Court, reaffirming earlier decisions held state court actions are not reviewable until there has been litigation not only on whether there is a taking, but additionally on the payment of just compensation.

Ever since this court's decision in *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U.S. 251, 37 S.Ct. 295, 61 L.Ed. 702 (1917), a state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not "final." In such a case, "the remaining litigation may raise other federal questions that may later come here." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127, 65 S.Ct. 1480, 89 L.Ed. 2092 (1945). This is because "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163, 94 S.Ct. 407, 412, 38 L.Ed.2d 379 (1973).

Id. at 632, 633

In a more recent decision, the U.S. Supreme Court, following the *San Diego* case and other prior decisions held that no finality existed in earlier cases where the "factual disputes yet to be resolved by State authorities might still lead to the conclusion that no taking has occurred . . . consideration of the remedial question in those circumstances, . . . would be premature." *First English Evangelical Lutheran Church of Glendale*

v. County of Los Angeles, California, 482 U.S. 304, 311, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Although the Supreme Court of Missouri did not expressly determine through the decision of the Court of Appeals that no taking has occurred, it was implied in the decision denying payment of the Commissioners' Award. [Pet. App. A p. A-2] Such denial implied that no taking has occurred which deserves just compensation and they expressly held that there was no final assessment upon which they could force execution. There are still issues to be resolved in the state courts which may yield additional Federal questions.

a. AVAILABLE STATE REMEDY

Petitioner is requesting the U.S. Supreme Court to determine that there has been a temporary taking or damaging of his property for which he deserves compensation under the guidelines of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California*, 482 U.S. 304, 311, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Respondent recognizes that under certain situations this Court may consider appropriate the payment of compensation for temporary takings. See *First English Evangelical, supra*. This issue however, is not before the Court in this appeal. Such an argument is only appropriate in a separate action of inverse condemnation as any payment required of the condemning authority in the present suit would effectuate a permanent taking.

In Missouri, an action in inverse condemnation is not specifically provided as a remedy by statute. Missouri courts however, have long recognized that the right to bring such a suit is inherent by virtue of the constitutional prohibition of taking property without just compensation. *Roth v. State Highway Commission of Missouri*, 688 S.W.2d 775, 777 (Mo. App. 1984); *Harris v. Missouri Department of Conservation*, 755 S.W.2d 726, 729 (Mo. App. 1988). Petitioner has never presented any facts before the state courts of Missouri which would allow those courts to determine factually and legally if Petitioner has such a claim. Therefore, this issue is not properly before this Court and Respondent suggests that accepting the Petition for Writ of Certiorari would not be appropriate as Petitioner has not yet exhausted his available state remedies.

b. NO CONSTITUTIONAL TAKING

At present, this case has exceptions pending a jury trial on the amount of just compensation. These are the statutory and court procedures set forth which ensure the landowner compensation for land taken. Chapter 523 RSMo. and Supreme Court Rule 86. [Pet. App. D p. D-3 - D-5] In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) the U.S. Supreme Court held that the Fifth Amendment does not require "that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' " exist at the time of the taking. *Id.* at 194, quoting from *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125, 95 S.Ct. 335, 42 L.Ed.2d 3201 (1974), quoting *Cherokee Nation v. Southern Kansas Railroad Co.*, 135 U.S. 641, 659, 10 S.Ct. 965, 34 L.Ed. 295 (1890). The U.S. Supreme Court continued by holding the following:

If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation The Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate postdeprivation remedy for the property loss." *Hudson v. Palmer*, 468 U.S. 517, 532, n. 12, 104 S.Ct. 3194, 3203, n. 12, 82 L.Ed.2d 393 (1984). Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

Id. at 195. This language was very recently affirmed by the U.S. Supreme Court in *J. Paul Presault, et ux. v. Interstate Commerce Commission et al.*, 494 U.S. _____, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990).

The Petition for Writ of Certiorari is premised on the Constitutional right of the property owner to receive just compensation for property that is taken or damaged by the government. (Missouri Constitution, Article 1, Section 26.) [Pet. App. D] Respondent does not argue with this basic premise; however, Petitioner fails to present factual allegations sufficient to find that his property has been taken or damaged. Petitioner argues that the institution of condemnation proceedings which are to the point where exceptions to the Commissioners' Award have been filed is equal to a taking. The argument is that the notice of such proceedings filed with the Recorder of Deeds rises to the level of a taking as it places potential purchasers of the property on notice of the proceedings. This same argument was presented in *Government of Virgin Islands v. 50.05 Acres of Land*, 185 F.Supp. 495 (1960), where the defendants claimed an uncompensated taking.

"The reasoning seems to be that the very filing of this suit interferes with the normal freedom of an owner to use and dispose of his property. But such interference is inherent in all condemnation proceedings. No case has been cited or found which supports the view that the condemnation itself constitutes a taking. The Court finds no merit in it."

Id. at 498.

Such a recording with the Recorder of Deeds does not render petitioners property inalienable. Petitioner claims he has no "practical ability" to dispose of his property [Petition p. 7], but in fact, there has been no evidence presented wherein Petitioner has exhibited any inability or deterrence in selling his property because of the condemnation suit. Legally he may sell his entire property and the new owner may be substituted as a party to the condemnation suit. Also, Missouri Highway and Transportation Commission and the Court through its Order of Condemnation and the subsequent recording of the Commissioners' Award have placed no restrictions on Petitioners use of the land. He may improve it or use it in any manner which merely subjects the condemnor to the potential of paying more damages as the date of value under Missouri law will be the date of the trial unless the property is taken prior to trial. This is a risk the

condemnor may wish to take and the United States Supreme Court has found this to be a legitimate interest enjoyed by condemning authorities.

Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor. . . . Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to the acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. "The owner is protected by the rule that title does not pass until compensation has been ascertained and paid" A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

Danforth v. United States, 308 U.S. 271, 184 - 285, 60 S.Ct. 231, 84 L.Ed. 240, quoting from *Hanson Lumber Co. v. United States*, 261 U.S. 581, 587, 43 S.Ct. 442, 67 L.Ed. 809.

The State of Missouri has taken no overt actions which rise to the level of a taking including any physical invasion or possession of said property. The particular parcel in question has not been made part of any contract for the project in question for the very reasons pronounced in *Danforth*, supra, nor has Roth alleged that any such action have been taken by the State. "Whether property has been taken for a public use so as to require just compensation is determined by the character of the invasion, not by the amount of damage suffered." *Woodland Market Realty Company v. City of Cleveland*, 426 F.2d 955 (1970); citing *United States v. Cress*, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746 (1917).

Again, Petitioner has not presented any facts upon which a Court could find a taking at this time. Petitioner cannot contest the adequacy of the State's condemnation proceedings as to whether they fail to provide just compensation for a taking. Missouri law provides the right to a trial by jury for the landowner on the issue of just compensation and all other procedural steps enumerated in the statutes and rules have remained unchallenged and unchanged. The Missouri Supreme Court Rule 86.06 does not deny landowners right of just compensation. It merely limits the Court's authority to enforce the payment of compensation until such time as the Court can find an actual taking has occurred. In Missouri a taking is not until the Commissioners' Award is paid or until such time as the verdict becomes final which is not until all available procedures have been exhausted. *North Kansas City School District v. J.A. Peterson-Renner, Inc.*, 369 S.W.2d 159 (Mo. 1963), citing *State ex rel. Hilleman v. Fort*, 180 Mo. 97, 79 S.W. 167 (1904), *State ex rel. State Highway Commission v. Deutschman*, 346 Mo. 755, 142 S.W.2d 1025 (1940), *Washington University Medical Center Redevelopment Corporation v. See*, 654 S.W.2d 192 (Mo. App. 1983).

**c. MISSOURI SUPREME COURT RULE 86.06 IS
WITHIN THE SCOPE OF THE JUDICIARIES AU-
THORITY**

The Missouri Court of Appeals, Eastern District, directly decided in the opinion of *State ex rel. Behle, et al. Exceptions of Donald Roth v. Stussie*, 793 S.W.2d 567 (Mo. App. 1990), [Pet. App. A] that Missouri Supreme Court Rule 86.06 supersedes Section 523.040 Missouri Revised Statute by virtue of Rule 41.02 which directs that when the rules and statutes are in conflict, the rules are controlling [Pet. App. D]. This decision was appealed to the Missouri Supreme Court which denied transfer [Pet. App. A]. The pertinent difference between Rule 86.06 and Section 523.020 RSMo. is additional language in the Rule:

In Missouri Supreme Court Rule 86.06:

... upon failure to pay the assessment foresaid, *within 10 days after it becomes final*, ... the Court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, ... (emphasis added)

In Section 523.040 Revised Missouri Statutes:

... and upon failure to pay the assessment, aforesaid, the court may, upon motion and notice by the part entitled to such damages, enforce the payment of the same by execution.

Petitioner's contention is that the language requiring finality of the assessed value is an attempt by the Supreme Court to alter a substantive right and to change the legislative intent of the statutory condemnation scheme.

There are two key phrases Petitioner chooses to gloss over which are identical in both Rule 86.06 and Section 523.040 RSMo. First is that "the Court *may* upon motion" which specifically implies that the motion is subject to judicial review and is discretionary based on the facts presented. Petitioner misrepresents to this Court that there is case law in Missouri which holds that the word "may" in this statute must read as "shall" *State ex rel. Holladay v. Withrow*, 24 S.W. 638 (Mo. 1891). Respondent would note that factually Holladay varied greatly from the present case and *State ex rel. Behle, supra*, held that the language in Holladay was not controlling case law in Missouri [Pet. App. A].

Additionally the remedy found in the Rule and the statute is for the courts to enforce payment by "execution." Execution is not an available remedy until there is a final judgment on which such remedy may be invoked. It was clearly then the intent of the legislature that finality exist before the Court enforce payment by the condemning authority. The language of Rule 86.06 is not an attempt to fill an omission, but is redundant of the original language of the statute.

It is exactly through the phrase in contention that the Supreme Court of Missouri acknowledges its limitations based on the separation of powers doctrine. Enforcing payment of the award, if there is no prior taking and before the assessment is final, would in effect be a judicial taking and such actions would be commensurate to enacting a legislative function by the courts. *Howell Plaza, Inc. v. State Highway Commission*, 226 N.W.2d 185 (Wi. 1975). Payment of the award constitutes a permanent taking by the condemning authority and the courts cannot force such actions.

If Petitioner's suggestion that the Court should enforce payment of the Commissioners' Award as per Section 523.040 RSMo. were accepted, that would truly be a breach of the separation of powers doctrine as such actions by the Court would force the government to take the property, a function which belongs solely to the legislature. The government or condemning authority must be allowed to control the decision making process in condemnation actions. This does not mean that its actions are not subject to judicial review, but without a factual basis which constitutes a prior taking, the courts cannot force payment of the award.

The taking in this process [condemnation] is accomplished when payment of the award is made, and until then, the government may discontinue or abandon its effort. The award is no more than an offer subject to acceptance by the government, and gives it the opportunity to determine whether the valuation fixed is within its resources or acceptable. In other words, condemnation is a means by which the government may find out what any piece of property will cost. No title passes until the compensation is paid.

United States v. Certain Lands in the Town of Highlands, Orange County, N.Y., 46 F.Supp. 386 (1942) citing *Danforth v. United States*, 308 U.S. 271, 284, 60 S.Ct. 231, 84 L.Ed. 240; *Barnidge v. United States*, 8 Cir., 101 F.2d 295, 298.

The decision of whether private property should be taken for public benefits is clearly a function of the legislative, its agent, or as in this case, an agency deriving the authority from Article IV, Section 29 and Section 30 of the Constitution of Missouri; Missouri Supreme Court Rule 86; and Chapter 523, Revised Missouri Statutes, 1986. This was recently reaffirmed by the U.S. Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California*, 482 U.S. 304, 311, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

In *Trager v. Peabody Redevelopment Authority*, 367 F.Supp. 1000 (1973), the District Court held that

Due process for individuals is provided in the determination of how much each individual should be compensated for his par-

ticular piece of property. This determination is adjudicatory and each owner is entitled to his day in court.

Id. at 1002, citing *United States v. Cormack*, 329 U.S. 230, 247, 67 S.Ct. 252, 91 L.Ed. 209 (1946).

Courts are clearly an integral part of the condemnation process. The amount of just compensation to be paid is within the discretion of the judiciary. It is also the function of the Courts to determine from the facts, whether a taking has occurred for which compensation is due. Rule 86.06 is despositive of the fact that the Supreme Court of Missouri knows the Court may not interfere until a taking has occurred, which is either when the money is paid or a trial on the exceptions and all available processes after a verdict have been exhausted. *North Kansas City School District v. J.A. Peterson-Renner, Inc.*, 369 S.W.2d 159 (Mo. 1963), citing *State ex rel. Hilleman v. Fort*, 180 Mo. 97, 79 S.W. 167 (1904). Then, and only then, may the Court force the government or condemning authority to pay for the land because a taking has occurred.

CONCLUSION

The Supreme Court of Missouri was cognizant of the boundaries of their authority when they drafted Rule 86.06. It is the limitations of their authority that necessitated the finality language. The actions by the Missouri Highway and Transportation Commission are not commensurate to a taking. Petitioner has failed to demonstrate any actions which rise to the level of a taking which would then allow the courts to step in to enforce compensation. The Petition for Writ of Certiorari is without merit in all aspects. There has been no taking, the Supreme Court of Missouri cannot force such a taking and therefore, Rule 86.06 promulgated by that Court has not exceeded that Court's Constitutional authority.

Petitioner has not presented a claim to this Court which rises to the level of a taking sufficient to invoke the Due Process clause of the Fifth and Fourteenth Amendments. The condemning authority cannot be forced by the Courts to take possession of property by paying an

assessment that is equal only to an offer is not the final assessment upon which the Court can enforce execution as prescribed by both the statutory provision of Section 523.040 RSMo. (1986), and the Supreme Court Rule 86.06. Such premature action and intervention by the Courts would be tantamount to a legislative function and certainly in derogation to the separation of powers doctrine. Respondent respectfully requests that for the above stated reasons the Petition for Writ of Certiorari should be denied and Petitioner should be directed to make his claim, should he have one, to the appropriate state court.

Respectfully submitted,

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